(36)

No. 105, Original

Supreme Court, U.S.
FILED
APR 27 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO

On Exceptions To The Fourth Report Of The Special Master

MOTION FOR LEAVE TO FILE SUR-REPLY AND KANSAS' SUR-REPLY TO THE UNITED STATES

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MOTION FOR LEAVE TO FILE SUR-REPLY TO THE UNITED STATES

Comes now the State of Kansas and files this Motion for Leave to File the attached Kansas' Sur-Reply to the United States. The grounds for this Motion are as follows:

1. On December 8, 2003, the Court received, and ordered filed, the Fourth Report of the Special Master. The Court additionally ordered that "[e]xceptions to the Report, with supporting briefs, may be filed within 45 days," and that "[r]eplies, if any, with supporting briefs, may be filed within 30 days."

2. On January 22, 2004, Kansas filed Exceptions and a supporting Brief. Replies would have been due on February 23, 2004, but, at the request of the United States, an extension of time until and including March 22, 2004 was granted. See Clerk's Letter of February 11, 2004.

3. The Brief for the United States in Opposition to the Exceptions of Kansas (Brief for the United States or U.S. Brief) was filed on March 22, 2004.

4. The United States, although a party to this action, did not participate in the proceedings before the Special Master that formed the basis for Kansas' Exceptions to the Fourth Report.

5. Kansas has had no previous opportunity to address the newly announced positions of the United States on the subjects addressed in the Brief for the United States.

6. The United States has no objection to this Motion.

WHEREFORE, the State of Kansas moves for leave to file the attached Kansas' Sur-Reply to the United States.

Respectfully submitted,

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KANSAS' SUR-REPLY TO THE UNITED STATES

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I. STATEMENT

The Special Master has submitted his Fourth Report in this proceeding. Kansas has submitted six Exceptions to the Fourth Report with its Brief in Support (Kan. Brief). Colorado and the United States have filed replies to some or all of the Kansas Exceptions. This Sur-Reply responds to the Brief for the United States in Opposition to the Exceptions of Kansas (Brief for the United States or U.S. Brief).

Although the United States is a party, it has not participated for the most part in proceedings before the Special Master since the issues potentially affecting federal agencies were disposed of in 1995. See *Kansas v. Colorado*, 514 U.S. 673 (1995); Second Report of Special Master 4 (1997). Although no federal agency will be affected by the Court's rulings on Kansas' Exceptions to the Fourth Report, the United States has nevertheless asserted "a significant institutional interest in the proper administration and enforcement of interstate compacts," and has opposed two of Kansas' Exceptions. U.S. Brief 10.

The two issues addressed in the Brief for the United States are (1) whether an expert river master should be appointed to administer the final decree regarding Colorado's continued postcompact well pumping, and (2) whether Kansas is entitled to prejudgment interest beginning to accrue in 1985 on damages incurred before 1985 as a result of Colorado's violations of the Arkansas River Compact (Compact). In this Sur-Reply, the State of Kansas examines the validity of the positions of the United States on these two issues.

II. SUMMARY OF ARGUMENT

A. River Master

The State of Kansas has proposed that the decree in this case be implemented by a Pecos-style river master in light of Colorado's insistence on continued postcompact pumping and the consequent need to determine depletions and credits each year to measure Compact compliance. Thus, following closely the example of *Texas v. New Mexico*, 482 U.S. 124 (1987), Kansas has recommended appointment of an expert river master whose duties will be limited as the Court deems appropriate and whose determinations will be subject to clearly erroneous review by the Court. The United States fails to acknowledge the success of the Pecos River Master. Rather, the United States asserts a number of concerns of a theoretical nature that were not concerns of the Court when it instituted the Pecos River Master in 1987 and which have not proven to be practical concerns during the 16 years of the Pecos River Master's existence.

The United States makes the questionable and unsupported assertion that appointment of an independent, expert river master would actually promote adversarial confrontations. This assertion challenges fundamental notions that underlie this Court's original jurisdiction and the success of the Pecos River Master in minimizing further litigation.

The counterproposal of the United States is to refer such disputes as may arise in the implementation of this Court's decree to the Arkansas River Compact Administration. The States and Congress, however, did not create the Administration to implement a litigated decree of this Court. To accept this recommendation would be to upend

the teaching of the Court's precedents and to encourage unnecessary resort to this Court's original jurisdiction.

B. Prejudgment Interest

The Court's Opinion of June 11, 2001, set out a bright-line rule that could be readily applied in other interstate cases, subject to the Court's discretion to balance the equities in a particular case. The United States would supplant the Court's bright-line rule with a vague standard that would be difficult to administer in future cases. It would also depart from the Court's reasoning in the cases on which the Court relied to reach its decision in this case. In those cases, interest was applied to the amount of damages owing at the time accrual of prejudgment interest was to begin. The United States opposes such application of prejudgment interest in this case.

The United States' position would violate the principle at the root of the rule announced in the Court's Opinion, namely, that the value of Kansas' claim in the year in which suit was commenced would be preserved against diminution during the pendency of the litigation. In contrast, the United States' standard would ensure the diminution of the value of the claim during the pendency of the litigation and provide an incentive for the defendant State to prolong the litigation. Prefiling damages, the lion's share of damages in this case, would be interest-free, which would insulate from interest the very damages that motivated the initiation of this litigation. If there had been no post-1984 damages in this case, there would be no prejudgment interest awarded at all under the United States' formulation.

The United States also focuses in part on the specific amount of an interest award and implies that the principles endorsed by the Court in fashioning an award should be driven by the dollar amount involved and not vice versa. Finally, the United States erroneously suggests that Kansas acquiesced in the accounting that underpins the United States' position. This is an unfair suggestion, given Kansas' unfailing support of a complete award of prejudgment interest through and until the time of the Court's ruling that interest should begin to accrue in the year in which the case was filed.

III. ARGUMENT

A. Appointment of an Expert River Master Whose Decisions Would Be Subject to Clearly Erroneous Review Constitutes the Most Efficient Way to Conclude this Litigation.

The Special Master and the State of Kansas agree that expeditious resolution of this litigation is needed. See Fourth Report of the Special Master 136. The United States also seems to share this view. See U.S. Brief 14 (quoting Fourth Report 136). The Special Master and the State of Kansas further agree that appropriate resolution of this litigation must include a means to assure that Kansas will be reasonably protected from further violations of the Arkansas River Compact as a result of the continuation of postcompact well pumping in Colorado. See *id.*, at 121 ("One of the most vexing issues left to be decided in this case is how to reasonably assure that Colorado will continue to meet its compact obligations"). However, the United States opposes the appointment of an expert river master, arguing that such an appointment would prolong the litigation. Kansas believes that such an

appointment, with appropriate limitations and standard of review, would greatly reduce the likelihood of further litigation.

1. The Arkansas River Compact Administration Is Not a Viable Alternative to a River Master.

The United States argues that the "appointment of a river master is neither desirable nor necessary because there is an available and preferable alternative," namely, the Arkansas River Compact Administration (Administration). U.S. Brief 14-15. The United States fails to acknowledge, however, that it was because of the structural inability of the Administration to resolve disputes related to postcompact well pumping and Compact compliance that this case was filed in the first place. See, *e.g.*, *Kansas v. Colorado*, 514 U.S. 673, 689 (1995) ("As late as 1985, Colorado officials refused to permit an investigation by the Administration of well development in Colorado"); Kansas Brief in Support of Motion for Leave to File Complaint 8-9. Moreover, Colorado's primary argument against the Motion for Leave to File Complaint in this case was that Kansas had "an adequate means for vindicating its concerns through a pending investigation by the Administration." Colorado's Brief in Opposition to Motion for Leave to File Complaint 1. The Court implicitly rejected the Administration as a viable alternative for determining the issues in this proceeding by granting Kansas leave to file its complaint. See *Kansas v. Colorado*, 475 U.S. 1079 (1986) (order granting motion for leave to file complaint). The Administration is no more able to protect the interests of Kansas today than it was when this litigation began 18 years ago.

The United States argues that "[t]he Administration is the appropriate body to resolve complex technical issues respecting the computer model that will be used to measure Colorado's compliance with its Compact obligations." U.S. Brief 10-11. This statement disregards the limitations, both procedural and technical, placed on the Administration by the States and Congress. Simply put, *the Administration cannot resolve any issue on which the States disagree.* This fundamental limitation is at the heart of the intent of the States and of Congress in their approval of the Arkansas River Compact. See Arkansas River Compact (63 Stat. 145 (1949)), Art. VIII-D, App. to Kan. Brief 12 ("Each State shall have but one vote in the Administration and every decision, authorization or other action shall require unanimous vote").

Although the Administration can sometimes provide a convenient forum for the States to discuss issues on which they can come to agreement, the Administration is an unworkable forum in which to resolve issues on which the States cannot agree. The Court has consistently declined to refer compact enforcement issues to a body that can act only with the cooperation of all the States. See *Green v. Biddle*, 8 Wheat. 1, 90-91 (1823); *Texas v. New Mexico*, 482 U.S. 124, 133 (1987) ("That [allocation] formula was fashioned in the course of this litigation, which was occasioned by the inability of the Pecos River Commission, on which Texas and New Mexico have the only votes, to agree on how river water should be divided"); *Oklahoma v. New Mexico*, 501 U.S. 221, 240-241 (1991).

Further, even if the Administration were able to resolve disputes, it has little inherent expertise to "resolve complex, technical issues." U.S. Brief 14. Two thirds of the members of the Administration are water users, not

technical engineering or computer modeling experts. See Arkansas River Compact, Art. VIII-C, App. to Kan. Brief 12. The Administration has no technical staff, independent or otherwise. To the extent that technical engineering or hydrologic issues become relevant to the Administration's activities, the Administration simply relies on technical experts of the States or the Federal Government. See, *e.g.*, Arkansas River Compact, Art. VIII-G, App. to Kan. Brief 14.

As demonstrated above, the Arkansas River Compact Administration is not equipped to resolve disputed issues such as those that the United States would have it resolve. Its inability to make decisions on disputed issues and its overall lack of technical expertise make the Administration an unworkable forum to resolve issues arising under the decree in this case.

2. Contrary to the Assertion by the United States, Appointment of a River Master Can Be Expected to Minimize Further Litigation on the Arkansas River.

The United States makes the unsupported assertion that appointment of a river master to resolve disputes between the States under the decree in this case "would likely promote continued adversarial proceedings and prolong this litigation." U.S. Brief 11. The State of Kansas believes otherwise. In Kansas' view, the presence of a court-appointed river master to resolve disputes under the decree would promote settlement of such disputes and minimize further litigation, particularly because an expert river master would be well-suited to resolve complex technical issues.

The Court itself has expressed views that appear to be closer to those of Kansas than of the United States in this case. In *Rhode Island v. Massachusetts*, 12 Pet. 657 (1838), the State of Rhode Island sought resolution of a boundary dispute with Massachusetts. Daniel Webster filed a motion to dismiss the suit for want of jurisdiction. The Court denied the motion. In the course of discussing compacts adopted under the Compact Clause of the Constitution, the Court stated, "Few [compacts], if any, will be made, when it is left to the pleasure of the State in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact." *Id.*, at 726 (quoted in *Kansas v. Colorado*, 185 U.S. 125, 144 (1902) (overruling Colorado's demurrer to Kansas' suit for apportionment of the Arkansas River)); accord, *Texas v. New Mexico*, 462 U.S. 554, 569 (1983). Likewise, when it is known that a river master can decide issues arising under the decree in this case, it is most probable that controversies will be settled by agreement, thus minimizing proceedings before the river master and proceedings directly before this Court.[1]

In this context, Colorado is the State "in possession" of the resource and, as the Court suggested in *Rhode Island v.*

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[1] The United States asserts that it has encouraged the use of alternative means of dispute resolution in original actions "as a means to diffuse or resolve interstate disputes that might otherwise lead to motions for leave to invoke this Court's original jurisdiction." U.S. Brief 17 n.4. Actually, in both cases cited by the United States, motions for leave to invoke this Court's original jurisdiction were filed. See *Nebraska v. Wyoming*, No. 108, Orig., 479 U.S. 1051 (1987); *Kansas v. Nebraska*, No. 126, Orig., 525 U.S. 1101 (1999). It was only after this Court had accepted the cases and had made preliminary rulings that it was possible to resolve those interstate disputes.

Massachusetts, few agreements on disputed issues, if any, will be made when it is left to the pleasure of the State in possession. The Court discussed this issue explicitly in the Pecos River litigation:

> "[I]f all questions under the Compact had to be decided by the Commission in the first instance, New Mexico could indefinitely prevent authoritative Commission action, solely by exercising its veto on the Commission. As New Mexico is the upstream State, with effective power to deny water altogether to Texas except under extreme flood conditions, the Commission's failure to take action to enforce New Mexico's obligations under Art. III(a) would invariably work to New Mexico's benefit." *Texas v. New Mexico*, 462 U.S. 554, 568-569 (1983).

Of course, Kansas retains its right to seek relief in this Court under such circumstances, as the Court held in that case, but the purpose of utilizing an expert river master, whose decisions are subject to clearly erroneous review by the Court, is to minimize the need to resort to this Court's original jurisdiction. Indeed, a concern identified by the Court in *Texas v. New Mexico* was the likelihood of repeated original actions if a river master were not appointed. See 482 U.S. 124, 134 ("Absent some disinterested authority to make determinations binding on the parties, we could anticipate a series of original actions to determine the periodic division of the water flowing in the Pecos").

The Court has earlier emphasized the need to utilize its original jurisdiction sparingly. *Mississippi v. Louisiana*, 506 U.S. 73, 76-77 (1992); *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). Nevertheless, if disputes arise between Kansas and Colorado over the implementation of the decree in this

case, only this Court has jurisdiction to resolve those disputes. See, *e.g.*, *Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992).

The United States fails to acknowledge that the expert Pecos River Master has functioned well and required little, if any, of the Court's time. In the 16 years since the appointment of the Pecos River Master, only once has review even been sought of his decisions. See *Texas v. New Mexico*, 485 U.S. 388, 394 (1988); 502 U.S. 803 (1991). Further, no new original jurisdiction litigation has been initiated, nor has either State sought to reopen the decree. In addition, only written submissions, for the most part, appear to have been employed by the Pecos River Master, with little apparent need for hearings. See App. to Kan. Brief 50-85. Thus, the Pecos River Master has proved to be an efficient and effective means for implementing the Amended Decree in *Texas v. New Mexico* and avoiding further original jurisdiction litigation on the issues covered by that decree.

On the Delaware River, the appointment of a Supreme Court river master has been followed by the adoption of the Delaware River Basin Compact, which incorporates the Court's Decree and provides for coordination between the Delaware River Basin Commission and the Court's River Master in the management of the Delaware River. See Delaware River Basin Compact, 75 Stat. 688 (1961). This and the Pecos River experience refute the United States' assertion that appointment of a river master on the Arkansas River can be expected to "promote continued adversarial proceedings and prolong this litigation." U.S. Brief 11. In fact, the opposite is much more likely.

3. Contrary to the Assertion by the United States, All of the Court's Precedents Support Appointment of an Expert River Master in this Case.

The United States asserts that "the Court has rejected the appointment of a river master or similar agent in" four cases. U.S. Brief 13 n.3. That assertion is open to considerable question in three of those cases, and all four cases support appointment of an expert river master in this case.

In *Vermont v. New York*, 417 U.S. 270 (1974), Vermont claimed that New York and International Paper Co. were "responsible for a sludge bed in Lake Champlain and Ticonderoga Creek that [had] polluted the water, impeded navigation, and constituted a public nuisance." *Ibid.* With the approval of the Special Master, the States had negotiated a settlement that hinged upon the entry of a proposed consent decree by the Court. The consent decree would install a "South Lake Master" with "all the usual powers of Special Masters named by [the Court]," and the mandate to "resolve matters of controversy between the parties after they [had] exhausted all administrative and other remedies (except judicial review)." *Id.*, at 270-71. In refusing to enter the consent decree, the Court noted that:

> *"[N]o findings of fact have been made; nor has any ruling been resolved concerning [the] equitable apportionment of the water involved* . . . The proposed South Lake Master would police the execution of the settlement set forth in the Decree and pass on to this Court his proposed resolution of contested issues that the future might bring forth. Such a procedure would materially change the function of the Court in these interstate contests. Insofar as we would be supervising the

> execution of the Consent Decree, we would be acting more in an arbitral rather than a judicial manner." *Id.*, at 276-77 (emphasis added).

The Court contrasted the case before it with *New Jersey v. New York*, 347 U.S. 995 (1954), where a river master was appointed on the Delaware River:

> "In that case (1) the rights of the parties to the water had been determined by the Court and (2) the sewage and industrial waste problems had been adjudicated and resolved. All that remained was to supervise the application of the various formulae which the Court had decreed, based on findings of fact." *Vermont*, 417 U.S., at 275-76.

In this case, the vast majority of issues have been litigated, there have been numerous findings of fact, there has been a quantification of the apportionment of water pursuant to the Arkansas River Compact, and there is a model by which Colorado's compliance is proposed to be measured. All that remains is for the Court to enter a decree and "supervise the application of the various formulae," *id.*, at 275-76, which was precisely the situation on the Delaware, see *ibid.*, and on the Pecos, see *Texas v. New Mexico*, 482 U.S. 124, 134 (1987). As the Special Master has acknowledged, this case is "remarkabl[y]" similar to *Texas v. New Mexico*. Fourth Report 125.

Moreover, by their settlement, Vermont and New York were asking the Court to exceed its Article III powers. *Vermont v. New York*, 417 U.S., at 277. The appointment of a river master in this case would not cause the Court to exceed its Article III powers. See *Texas v. New Mexico*, 482 U.S. 124, 134 (1987) ("[W]e are quite sure that our jurisdiction over original actions like this provides us with ample authority to appoint a river master and to enforce our judgment"). Nor is the Special Master, Colorado, or the

United States claiming that such an appointment would exceed the Court's Article III powers.

In addition to the important differences between this case and *Vermont* noted above, the Special Master's and the United States' reliance on *Vermont* leads to a skewed view of earlier Supreme Court precedents. Following the *per curiam* Opinion in *Vermont*, the Special Master and the United States cite *Wisconsin v. Illinois*, 281 U.S. 179 (1930), *New Jersey v. New York*, 283 U.S. 805 (1931), and *Wyoming v. Colorado*, 298 U.S. 573 (1936) as instances where the Court has refused to appoint a river master or "similar agent." See Fourth Report 130-131; U.S. Brief 13 n.3. But an examination of those cases shows that they were not, in fact, such instances.

In *Wisconsin v. Illinois*, 281 U.S. 179 (1930) the Court, responding to alternative proposals by Special Master Charles Evans Hughes, chose to require the filing of semi-annual progress reports directly with the Court instead of appointing a commission to supervise the gradual reduction in water diversion by the City of Chicago. *Id.*, at 198. The Court chose between two options, both of which provided for the Court to retain jurisdiction to supervise implementation of its decree. The alternative chosen by the Court actually required more direct attention by the Court than a commission would have. The Court recognized this in *Texas v. New Mexico*, 482 U.S. 124 (1987), a post-*Vermont* decision, by citing *Wisconsin* to support the proposition that a solution involving a river master, "or a like one, has been employed when the occasion demands." *Texas v. New Mexico*, 482 U.S., at 134.

In *New Jersey v. New York*, 283 U.S. 805 (1931), the Court allowed the City of New York to divert 440 million

gallons of water per day (mgd) from the Delaware River, subject to a minimum streamflow requirement and the rights of the other States to conduct inspections. *Id.*, at 805-806. In that initial decree, the Court denied without prejudice a request for the appointment of a river master, but the Court retained jurisdiction and provided that any of the parties might apply at the foot of the decree for further relief. *Id.*, at 807.

Twenty-three years later, the Court issued a new decree approving an increase in diversions by the City of New York to 800 mgd after the completion of certain reservoirs, subject to certain conditions and obligations, and authorized diversion of 100 mgd by New Jersey, also subject to certain conditions and obligations. Again, the Court retained jurisdiction, but this time a river master was also appointed. *New Jersey v. New York*, 347 U.S. 995 (1954).

The Delaware River Master was given certain general duties and certain specific duties, including administering the decree "so as to have [its] provisions . . . carried out with the greatest possible accuracy." *Id.*, at 1002. The specific duties include daily computations of streamflows adjusted to what they would have been absent the effects of upstream water operations and the directing of required daily releases from reservoirs. *Id.*, at 1003-1004. The Decree requires the River Master to make periodic quantifications on the basis of "observation and estimates" without specifying any formulas or methodologies. *Id.*, at 1003-1004. Thus, the *New Jersey v. New York* Delaware River litigation demonstrates that the Court has found it appropriate to appoint a river master where there are recurring requirements for hydrologic calculations and

estimates, as there will be under the Arkansas River Decree.[2]

Finally, the United States asserts that in *Wyoming v. Colorado*, 298 U.S. 573 (1936), the Court "rejected the appointment of a river master or similar agent." U.S. Brief 13 n.3. On the contrary, in *Wyoming*, the Court merely denied Wyoming's request to install Wyoming measuring devices at points of diversion inside Colorado. 298 U.S., at 585-86. There is no mention during the Court's discussion of the issue, or elsewhere in the Opinion, of a request for the appointment of a river master. In a later *Wyoming v. Colorado* Opinion, the Court referred to the issue of measuring devices:

> "With respect to the request for an order permitting Wyoming to install measuring devices for the purpose of determining the amount of water diverted in Colorado, the Court recognized that the problem of measuring and recording the diversions was a difficult one and the hope was expressed that the two States by cooperative efforts would find a satisfactory solution. Leave was granted to Wyoming to make a later application if the States were unable to agree. It seems that measuring devices have been installed." *Wyoming v. Colorado*, 309 U.S. 572, 578-79 (1940) (citations omitted).

Again, nowhere in the Opinion does the Court mention the appointment of a river master or the rejection of a request therefor. Instead, the Court had offered direct recourse to

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[2] This was also the situation in *Texas v. New Mexico*, 482 U.S. 124 (1987), as discussed below.

the Court if agreement could not be reached, the opposite of what the United States is suggesting here. And, with direct recourse to the Court available, the States, not surprisingly, reached agreement.

As shown above, a careful reading of the cases cited in opposition by the United States shows that they are not contrary to the appointment of an expert river master in this case, but, instead, affirmatively support such an appointment.

4. This is One of Those Occasions on Which the Court Should Appoint a River Master to Implement Its Decree.

The United States acknowledges that the Court, "on rare occasions, has appointed a river master to administer interstate water rights decrees." U.S. Brief 10. As the Court has stated: "In exercising this power [to appoint a river master], we have taken a distinctly jaundiced view of appointing an agent or functionary to implement our decrees . . . But . . . that solution, or a like one, has been employed when the occasion demands." *Texas v. New Mexico*, 482 U.S. 124, 134 (1987) (citations omitted). The Pecos litigation was clearly one of those occasions. This litigation is another.

The United States, in its discussion of the appointment of the Pecos River Master, properly focuses on the key considerations identified by the Court as being the "natural propensity of these two States to disagree if an allocation formula leaves room to do so" and the prospect of "a series of original actions to determine the periodic division of water." U.S. Brief 13 (quoting *Texas v. New Mexico*, 482 U.S., at 134).

Determining whether there is a "natural propensity of these two States to disagree" is necessarily one of judgment, but one can look to certain indices of disagreement that can provide some guidance. For instance, there has been more litigation on the Arkansas River between Kansas and Colorado than on the Pecos River between Texas and New Mexico. It was a concurrent resolution of the Kansas Legislature in 1901 that resulted in the Kansas Attorney General's initiating litigation that same year against Colorado, which led to the articulation of the Court's authority and principles for allocating the waters of interstate rivers between States. See 1901 Kan. Sess. Laws 766; *Kansas v. Colorado*, 185 U.S. 125 (1902). That litigation, brought under the Court's original jurisdiction, ended with the Court's decision in *Kansas v. Colorado*, 206 U.S. 46 (1907). Shortly thereafter, however, further litigation arose between Kansas and Colorado water users in the Federal District Court for Colorado, which led, in turn, in 1928, to the filing of further original litigation in this Court, which lasted almost 16 years. See *Colorado v. Kansas*, 320 U.S. 383, 387-388 (1943).

The Arkansas River Compact was thereafter negotiated and approved by Congress in 1949. 63 Stat. 145 (1949). Based on Compact violations beginning in 1950, this litigation was filed in 1985.[3] "Despite the diligence of the parties and the Special Master," *Kansas v. Colorado*, 533 U.S. 1, 16 (2001), and despite the initiation and settlement of another interstate water dispute involving

[3] Compact violations by Colorado have been determined in this litigation to have occurred in the years 1950-1984 and 1986-1996. App. to Third Report 64, 86 (col. g).

these two States in a different basin, see *Kansas v. Nebraska*, 525 U.S. 1101 (1999) (order granting leave to file bill of complaint); 538 U.S. 720 (2003) (decree approving settlement), this case has continued unabated and unsettled. See App. to Fourth Report 23-26 (joint report of the States re failure to settle despite best efforts of the Attorneys General). Thus, the disputes between these two States over the Arkansas River have been on the original docket of this Court some forty years since 1900.

By contrast, the first interstate litigation on the Pecos was initiated in this Court in 1974. See *Texas v. New Mexico*, 462 U.S. 554, 557-562 (1983). That litigation ended with the appointment of the Pecos River Master in 1988. *Texas v. New Mexico*, 485 U.S. 388 (1988). The fourteen years of litigation on the Pecos in the original jurisdiction thus constitute approximately one third of the time consumed in original litigation on the Arkansas. Further, impasse has arisen on the Arkansas River Compact Administration, just as it did on the Pecos River Commission. See *Kansas v. Colorado*, 514 U.S. 673, 689 (1995); *Texas v. New Mexico*, 462 U.S. 554, 560-562 (1983). Thus, the propensity for the two States in this case to disagree would appear to be at least as great as in *Texas v. New Mexico*.

The United States does not dispute that the allocation formula in this case leaves room for the two States to disagree. In fact, it emphasizes the complex nature of the computer modeling issues that will need to be resolved in order to implement the Hydrologic-Institutional Model (H-I Model) or change it. The United States argues that "the task of modeling the Arkansas River Basin is extraordinarily complex," and therefore, "appointment of a river

master is not appropriate in the circumstances presented here." U.S. Brief 12.

On the contrary, the Court's precedents would suggest that the greater the complexity of implementation, the greater the need for a river master. See discussion of *New Jersey v. New York, supra,* at 13-15. The Court has not found arguments based on the complexity of enforcement issues sufficient to dissuade it from addressing those issues directly. In response to the suggestion that the Court was embarking upon an enterprise involving administrative functions beyond its province in apportioning the waters of an interstate river, the Court has stated, "The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution." *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945). And if such issues are not referred to an expert river master, then they remain for direct resolution by the Court itself.

The United States also appears to draw a distinction between the H-I Model, which has been used in this case by the Special Master to determine Compact compliance, and the "formula" for apportioning the Pecos River's flows in *Texas v. New Mexico*. See U.S. Brief 13. It is undoubtedly true that there have been advances in the sophistication and accuracy of hydrologic analysis through the use of, *inter alia*, computer models, since *Texas v. New Mexico*. That increase in sophistication and accuracy, however, does not change the fundamental fact that both methods for allocation are essentially formulas. With the advent of computers, it is now more convenient and practical to handle complex calculations that represent hydrologic phenomena more completely and accurately than in earlier decades.

If the scope of responsibility of a river master as set by the Court in this case is essentially the same as the scope of responsibility for the Court's Pecos River Master, the greater part of the river master's duties will be to resolve recurring disputed data and modeling issues. See Kan. Brief 10-11. There will also be occasions where a State might propose a change in the H-I Model associated with operational changes in Colorado that would go beyond the yearly implementation issues. There is no reason to believe that this will challenge the capabilities of an expert river master such as Kansas has proposed. The Pecos River Master is Neil S. Grigg, who is a Professor of Civil Engineering at Colorado State University. See *Texas v. New Mexico*, 485 U.S. 388, 394 (1988) (order appointing river master); Tr. Vol. 168 at 51. It is an inherent part of Kansas' proposal, and the basis for proposing clearly erroneous review by the Court, that the river master on the Arkansas River also have technical expertise of a similar degree.

The clearly erroneous standard of review has worked well on the Pecos River, neither requiring significant time on the part of the Court, nor allowing the river master "largely unreviewable discretion." See U.S. Brief 14. Thus, the United States' concerns create a false issue that has not proven to be a problem on the Pecos River. There is no reason to believe that it would prove to be a problem on the Arkansas River.

In view of the foregoing, it would seem wise for the Court to appoint a river master with technical expertise and clearly specified duties, whose decisions would be subject to clearly erroneous review, instead of explicitly or implicitly inviting the parties to return directly to the Court with decree implementation issues in this case.

B. Kansas Should Be Entitled, Given the Prior Balancing of Equities By the Court, to Prejudgment Interest From 1985 on All Damages.

Kansas understands the Court's Opinion of June 11, 2001, to award prejudgment interest beginning in 1985 on the damages then owing. The Court identified Kansas' filing of this action as the event triggering the accrual of interest in this case. *Kansas v. Colorado*, 533 U.S. 1, 15-16 (2001). This determination implies that interest should accrue on the damages arising out of Kansas' then-existing claims because it is those claims, and not such claims as might later arise, of which Colorado then had notice. See *ibid.*

The United States does not share this understanding of the Court's Opinion. The United States focuses on the methodology for calculating prejudgment interest as the States implemented it pursuant to the Special Master's requirements *before* this Court issued its Opinion (incorrectly suggesting that Kansas accepted that methodology). In the United States' view, the Court did not intend to alter that methodology when it decided that interest should begin to accrue only after Colorado had notice of Kansas' claims. U.S. Brief 21 ("[W]hen this Court determined that prejudgment interest would commence in 1985, rather than in 1969, the Court did not intend to change the method by which the States had determined to calculate the interest award."). Rather, the United States argues, the Court envisioned a specific amount of damages to be awarded, and the Court's determination that interest should begin accruing in 1985 did not reflect a sentiment to award more interest than that generated by the prior methodology. *Ibid.* (citing App. to Fourth Report 14).

Kansas disagrees with the United States' assumption that the Court had in mind a specific damages figure to which Kansas should be limited. The Court's determination that interest should begin accruing in 1985 surely signifies more than some dollar figure that the Court envisioned for Kansas' damages award. It signifies, if nothing else, that once litigation is initiated and a defendant State is put on notice of the plaintiff State's claims, the defendant State should not be exempt from interest on the damages arising out of those claims. In this case the Court ruled that interest should not accrue before Kansas' filing of suit due to "the uncertainty over the scope of damages that prevailed" until that time and the fact that only Kansas had the power to begin the process of quantifying those damages. 533 U.S., at 16. But when Kansas did begin that process and removed any remaining uncertainty about the claims it was asserting, there was no longer any reason to exempt Colorado from the accrual of interest on Kansas' claims. The prior methodology for calculating interest would exempt Colorado from interest on all damages arising out of claims existing at the time of filing of the complaint. Interest would accrue only on damages arising thereafter. Indeed, if Kansas had incurred no additional damages after the filing of suit, the Court's award of interest would have been meaningless. There is nothing in the Court's Opinion to support such a result.

Arguing that the Opinion does reflect an intention to exempt from the accrual of interest all damages existing as of the filing of suit, the United States cites the "unique history and equities" of this original action; it would distinguish the Court's awards of interest in original actions from principles guiding such awards in cases

outside the Court's original jurisdiction. U.S. Brief 21-22. The United States emphasizes that the Court awarded interest as an exercise of discretion rather than on the basis of "a 'rigid theory of compensation for money withheld.'" *Id.*, at 22 (quoting *Kansas v. Colorado*, 533 U.S., at 15).

Kansas agrees that the Court's decision to award interest was and is discretionary. But the discretionary nature of the decision is no indication that the Court intended to exempt Colorado from interest on the damages existing at the time this action was filed. To say that a decision is discretionary is not to say that it should be undertaken without the guidance of neutral principles. See, *e.g.*, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) ("[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles'") (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (C.C.D. Va. 1807) (Marshall, C.J.)); *Brown v. Allen*, 344 U.S. 443, 496 (1953) ("We must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.' . . . Discretion without a criterion for its exercise is authorization of arbitrariness") (Frankfurter, J.) (quoting CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 139, 141 (1921)). In this original action, in particular, the precedents that the Court cited in deciding to award interest are exclusively from outside its original jurisdiction. See *Kansas v. Colorado*, 533 U.S., at 10-15. Those same precedents compel the conclusion that prejudgment interest should accrue on damages owing at the time an action is filed rather than only on such new damages as the plaintiff may incur while the action is pending. See Kan. Brief 29 (citing cases).

The United States argues that it is fair to exempt all damages incurred as of the filing of suit from interest reflecting lost investment opportunities. U.S. Brief 22. It points to "the uncertainties attending the availability of money damages and prejudgment interest as a remedy for violation of an interstate compact at the time the Arkansas River Compact was negotiated." *Ibid.* (citing opinion of O'Connor, J., concurring in part and dissenting in part).

A majority of the Court has ruled, however, that, despite uncertainties about whether interest would be imposed *as a matter of course*, Colorado had notice when it signed the Compact that interest could be awarded as part of an equitable remedy: "[W]e are confident that, when it signed the Compact, Colorado was on notice that it might be subject to prejudgment interest if such interest was necessary to fashion an equitable remedy . . . . " *Kansas v. Colorado*, 533 U.S., at 14; accord, *Texas v. New Mexico*, 482 U.S. 124, 130 (1987) (holding that Court could award money damages for breach of Pecos River Compact despite "the lack of specific provision for a remedy in case of breach"). The equitable considerations that justified deferring the accrual of interest to the time of suit conversely justify an award of interest on the damages then owing. Colorado had indisputable knowledge of Kansas' claims by that time, and the process of adjudicating those claims was underway. An award of interest on the damages then owing is consistent with – and, indeed, necessary to – the equitable remedy that the Court has fashioned for Colorado's breach of the Compact.

IV. CONCLUSION

The Exceptions of the State of Kansas to the Fourth Report of the Special Master that have been challenged by the United States should be sustained.

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